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No. 1408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, and BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

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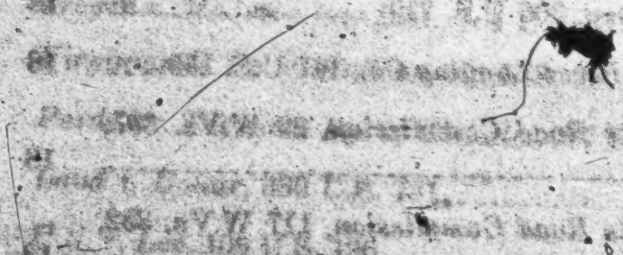

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Appellants

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THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, and BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

The subject on appeal in this mandamus proceeding was previously the subject of an appeal to this Court in a declaratory judgment proceeding from the same State Court, on the same Federal questions, and on the trial Court's similar action of dismissal on the ground it was an action against the state and prohibited by the *state constitutional immunity provision* (previous Jurisdictional Statement, Appendix A). *R. C. Wetherall, Jr., et al., v. The State Road Commission of West Virginia, et al.*, 382 U.S. 45 (1965).

On Appellees' Motion To Dismiss Appeal in the previous proceeding, the Attorney General of West Virginia *represented to this Court that Appellants had available in the State Court an adequate remedy in the form of a mandamus proceeding to compel the institution of eminent domain proceedings to acquire Appellants' property which was ap-*

propriated by The State Road Commission. (Motion To Dismiss Appeal in previous proceeding, Appendix B). This Court sustained Appellees' Motion and dismissed the appeal in the previous proceeding on the authority of its *per curiam* opinion in the companion case of *Howard Price, etc.* v. *The State Road Commission of West Virginia, et al.*, 382 U.S. 20 (1965) wherein the appeal had been dismissed *"in the light of the representations of the Attorney General of West Virginia that Appellant had an effective State procedure of which he had not availed himself"*, (382 U.S. 20, Appendix C). Pursuant to the representations of the Attorney General to this Court, Appellants instituted this *mandamus proceeding to compel the institution of eminent domain proceedings.* Appellees, by demurrer in this mandamus proceeding, then *repudiated* the representations of the Attorney General to this Court, and *on the same grounds* on which it dismissed the declaratory judgment proceeding, the Trial Court *dismissed this mandamus proceeding.* The subject matter and same Federal questions now come again before this Court. This controversy has been in the courts since September 24, 1963.

This appeal presents another and a complementary aspect of the denial of due process in the handling of The State Road Commission's highway construction contracts as contained in the companion appeal now pending in this Court styled *Howard Price dba Howard Price and Company* v. *The State Road Commission of West Virginia, a corporation, et al.* While the cases are factually different, they both involve the taking by the State of a contractor's work and materials as incorporated in public projects and denying him a day in Court to establish and enforce his rights.

Appellants, R. C. Wetherall, Jr., and Paul Price, appeal from the judgment of The Circuit Court of Kanawha County, West Virginia, entered on June 25, 1966, dismissing Appellants' petition in mandamus on the ground

it constituted a suit against The State of West Virginia. On petition for writ of error, timely filed, The Supreme Court of appeals of West Virginia, by order entered December 5, 1966, refused to review the judgment; and on a second petition, timely filed, said Court by order entered February 20, 1967, again refused to review the judgment and returned the record to The Circuit Court of Kanawha County. The time for re-petitioning for writ of error has expired. Appellants submit this statement to show that The Supreme Court of The United States has jurisdiction of the appeal and that substantial Federal questions are presented.

OPINION BELOW

The letter opinion of The Circuit Court of Kanawha County, West Virginia, dated March 11, 1966, is not reported. A copy of the opinion was made part of the record of the proceeding and is attached hereto as Appendix D. A copy of the letter opinion of the same date of the same court in the companion case of *Howard Price, etc.* v. *The State Road Commission et al,* referred to in the opinion in this case and by the Court's direction made a part of the record in this case, is also attached hereto as Appendix E.

JURISDICTION

Appellants filed their petition in mandamus in The Circuit Court of Kanawha County, West Virginia, on January 5, 1966. The petition sought to compel The State Road Commission of West Virginia and the Road Commissioner to institute eminent domain proceedings to acquire Appellants' materials, work, labor and services incorporated into a public dam pursuant to a highway and dam construction contract and which property of Appellants was appropriated by the Road Commission and the Road Commissioner without payment. It asked for other appropriate relief, including alternatively, a declaration of the rights of Appellants under the construction contract and upon such

declaration of rights, compulsion of the Road Commissioner to perform his statutory duty to audit Appellants' claim for work and materials performed and supplied. By the alternative prayer, for relief, Appellants incorporated in this mandamus proceeding a prayer for a declaration of rights such as was sought in the previous declaratory judgment proceeding, which in effect, again submits the propriety of declaratory relief for judicial consideration. On June 25, 1966, the Court entered its final judgment order sustaining Appellees' demurrer and dismissed the proceeding as a suit against the State. This is the judgment upon which review is sought. (Appendix F).

Appellants thereupon filed their petition for writ of error to The Supreme Court of West Virginia on August 24, 1966. On December 5, 1966, The Supreme Court of Appeals of West Virginia, entered its order refusing to review the case (Appendix G) and on second petition for writ of error, said Court on February 20, 1967, again refused to review the case (Appendix H). The time for re-petitioning had expired and the record was returned to The Circuit Court of Kanawha County.

Notice of Appeal to The Supreme Court of The United States was filed with The Circuit Court of Kanawha County on April 17, 1967.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Kanawha County, West Virginia, on appeal is conferred by Title 28, United States Code Section 1257(2). The application of a state constitutional provision as against the contention of its repugnancy to the Fourteenth Amendment and the commerce clause of Section 8, Article I, of the Federal Constitution, on the facts of the case, is within the purview of such section *Torcaso* v. *Watkins*, 367 U.S. 488; *Delmas* v. *Merchants Mutual*, 14 Wall. 661; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *U. S.* v. *County of Allegheny*, 322

U.S. 174; *Tregea* v. *Modesto Irr. Dist.*, 164 U.S. 176. The Circuit Court of Kanawha County was the highest court in which a decision could be had. *Virginia R. Co.* v. *Mullens*, 271 U.S. 220.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Parden* v. *Terminal Railway of Alabama State Docks*, 377 U.S. 184; *Land* v. *Dollar*, 330 U.S. 731; *U. S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Rolston* v. *Crittenden*, 120 U.S. 390; *Sterling* v. *Constantin*, 287 U.S. 378; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *West* v. *Chesapeake and P. Tel. Co.*, 295 U.S. 662; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82.

STATE CONSTITUTIONAL PROVISION INVOLVED

1. Constitution of West Virginia, 1872 (as contained in Official Code of West Virginia, 1931, p. xlix), as Amended by House Joint Resolution No. 3, Acts and Resolutions of the 42nd Legislature of West Virginia, Regular Session 1935, p. 662; Chapter 23, same volume, p. 134, submitted to voters; Ratified 1936. (The amendment added an exception pertaining only to garnishment which is not here relevant):

ARTICLE VI

* * *

STATE NOT TO BE MADE DEFENDANT IN ANY COURT

§35: *The State of West Virginia shall never be made defendant in any court of law or equity,* * * * (Italics supplied).

* * *

STATE STATUTES INVOLVED

Section 1, Article 2, Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the section. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code (unofficial) conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 2. STATE ROAD COMMISSION

Section 1. STATE ROAD COMMISSION; PURPOSES AND RESPONSIBILITIES.—The State Road Commission of West Virginia, heretofore created and *existing as a corporation,* shall be and is hereby continued as in this article provided. The commission is hereby authorized and empowered to adopt and use a seal; *to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings;* and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes (Chapter 143, Acts of the Legislature of West Virginia, Regular Session, 1957, pp. 669; Chap. 17, Art. 2, Sec. 1 of Michie's West Virginia Code, (1966), p. 7) (Italics supplied.)

• • •

2. The following statutes are also pertinent as pertaining to the Road Commissioner's duty to audit contractor's claims and issue requisitions for their payment; the statutory direction that road construction shall be performed under contract awarded by bid, giving detailed statutory requirements; and the statutory authority for the State Conservation Commission to undertake the construction of slack water dams through the office and facilities of the State Road Commission.

Chapter 17, Code of West Virginia, 1931, as amended:
Article 3, Section 4
Article 4, Sections 19, 20 and 21

Chapter 20, Code of West Virginia, 1931, as amended;
Article 5, Part II, Sections 6, 7, 8, 9, 10
(See Appendix I for pertinent parts of above sections, and official reference to amending Acts of the Legislature).

QUESTIONS PRESENTED

The appeal in the previous declaratory judgment proceeding was dismissed by this Court on Appellees' representations that mandamus to compel eminent domain proceedings was Appellants' effective state remedy (more fully set forth in opening paragraphs of this Jurisdictional Statement, pp. 1, 2). Thereupon Appellants, highway contractors, filed a petition in mandamus against Appellees, The Road Commission and Road Commissioner, to compel them to institute eminent domain proceedings to legally acquire their property in the form of material, work, services, and labor, incorporated in a dam pursuant to a public highway and dam construction contract between Appellant Price and Appellees, and appropriated by Appellees without payment. The cost of the dam was to be paid for by the State Conservation Commission through the Road Commission, and the Federal Government participated in the cost of both the dam and the highway. The contractor was required to bid the dam work under the contract item, "Borrow Pit Excavation", and was paid for such work by Appellees during its progress by a monthly estimate under such item. Appellees collected from the Conservation Commission the amount of money required to pay for the dam as computed under such item and after the work was completed and accepted by Appellees, Appellees arbitrarily deleted the item from the contract and deducted the amount of payments previously paid therefor from money acknowledgedly due for items of highway construction.

Appellees then repudiated their representations to the U. S. Supreme Court and again claimed State immunity by

demurrer to Appellants' petition. The petition in mandamus, in addition to seeking to compel Appellees to institute eminent domain proceedings, asked also for other appropriate relief, including alternatively, a declaration of the rights of the parties, as sought in the previous declaratory judgment proceeding. On Appellees' demurrer, the trial Court again held the proceeding was against the State of West Virginia and *absolutely prohibited*. In the premises, the questions presented are:

1. Were the actions of the Road Commissioner as alleged and the action of the trial Court, in applying the immunity provision of the State Constitution and dismissing the mandamus and alternative declaratory judgment proceeding, repugnant to:

   (1) Section 1 of the Fourteenth Amendment to the Federal Constitution on the grounds that they:

      (a) constituted a denial of due process of law by the State?

      (b) constituted the taking by the State of private property for public use without just compensation?

      (c) constituted a denial by the State of equal protection of the law?

   (2) Section 8, Article I, of the Federal Constitution on the grounds that they constituted an interference with and burden upon interstate commerce?

2. Does the application by the trial Court, on Appellees' *demurrer*, of the immunity provision of the State Constitution to Appellants' petition for mandamus and alternatively a declaration of rights, and without further proceeding on the merits or an interpretation of the contract, constitute a denial of due process of law under the Fourteenth Amendment of the Federal Constitution?

HOW FEDERAL QUESTIONS ARE PRESENTED

The Federal questions are initially presented by Appellants' mandamus petition (Appendix J). The mandamus petition alleges in part as follows (Appendix J, p. 98a):

> "That said Road Commission and Road Commissioner are respectively a public instrumentality and a public official of the State and charged with the solemn *duty to abide by and uphold the Constitution * * * of the United States * * * and in the performance of their duties to so act and conduct themselves in such manner as not to deprive any person of life, liberty, or property without due process of law as required by Section 1 of the Fourteenth Amendment to the Federal Constitution * * * nor to take private property for public use without just compensation as required by the Fifth Amendment to the Federal Constitution (as made applicable to the States by the Fourteenth Amendment as aforesaid.)* * *.* In pursuance of the duties aforesaid, it is the further duty of Respondents to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property taken and appropriated by them for public use." (Emphasis added.)

After alleging the property appropriated by the Appellees, the mandamus petition further charges (Appendix J, p. 108a):

> ". . . that Respondents, NOTWITHSTANDING the fact that the *Road Commission has collected* from the Conservation (Commission) *the money for the payment of such property* and their duties *not to deprive Petitioners of their property without due process and not to take such property for public use without just compensation as guaranteed by the Federal Constitutional provisions aforementioned,* did wrongfully abrogate the terms of said contract and deprive Petitioner Price of his property right therein, and did wrongfully appropriate Petitioners Price and Wetherall's work, labor, services and materials incorporated in the public dam and deprive Petitioners

> of their property therein of the value aforesaid without due process and did take same for public use *without just compensation in violation of the Federal Constitutional provisions* aforementioned; and NOTWITHSTANDING Respondents' further duty . . . have refused to perform their duty to institute proceedings in eminent domain to legally acquire such property from Petitioners and pay them just compensation therefor." (Emphasis supplied.)

Appellees filed a demurrer and an answer to the petition, the salient point of which was that the proceeding was a suit against the State of West Virginia and prohibited by the immunity provision of the State Constitution. No responsive pleading to a demurrer is permissible. To Appellees' answer, Appellants filed a demurrer and a reply, which again set forth the Federal grounds as follows (Record, p. 137, 146):

> "(1) Petitioners' rights are grounded on Section 1 of the Fourteenth Amendment and on the Fifth Amendment to the Federal Constitution as made applicable to the States by the Fourteenth Amendment, and the gravamen of said petition is the violation of Petitioners' property rights protected thereby, and any application of the immunity provision of the State Constitution to the facts of this case and the protection of Petitioners' property rights is repugnant to the rights guaranteed to Petitioners by the Federal Constitution as aforesaid and would deprive Petitioners of their property without due process and constitute a taking of private property for public use without just compensation."

The trial Court issued its opinion by letter dated March 11, 1966, and entered its final order in conformity therewith sustaining Appellees' demurrer and dismissing the proceeding on the ground that it was an action against the State of West Virginia. The trial Court noted Appellants' Constitutional arguments in its opinion (Appendix D, p. 73a) stating:

> "* * * The first ground of the demurrer states that the

> petition is not sufficient in law, in that it asserts an action against the State . . . prohibited by Article VI, Section 35, of the Constitution of West Virginia. The factual situation, as shown by the petition in this case, is very similar to that in the case of *Howard Price* v. *The State Road Commission* decided by me on this date * * * the petitioners assert a property right in said contract and in the work performed and the materials furnished and contend that they may not be deprived thereof without just compensation perforce the Fifth Amendment to the Federal Constitution * * * *the constitutional question raised by the first ground of the respondents' demurrer is discussed by me in the decision in the Howard Price case, of this date,* and for the reasons therein stated, the demurrer will be sustained upon this ground * * * an order dismissing the petition * * * should make this letter memorandum of opinion *and the memorandum of opinion in the Price case a part of the record.*" (Emphasis added.)

The memorandum opinion in the Howard Price case, referred to in the opinion in this case and made a part of the record in this case by direction of the trial Court, states in part as follows (Appendix E, p. 78a):

> "* * * The petitioner here strongly contends and argues that Article VI, Section 35, of the Constitution of West Virginia contravenes the provisions of the United States Constitution forbidding the denial of due process of law, and the provisions of the Federal and State Constitutions inhibiting the taking of private property without just compensation and denying equal protection of the law, as applied to this petitioner."

The Appellants' objections to the Court's ruling and their reasons therefor were noted in the final order itself (Appendix F, p. 86a). The reasons embracing Federal grounds read as follows:

> "1. The application by the Court to this case of Section 35, Article VI, of the Constitution of West Virginia is repugnant to Section 1 of the Fourteenth

Amendment to the Federal Constitution, and to the Fifth Amendment to the Federal Constitution as made applicable to the States by the Fourteenth Amendment of the Federal Constitution, in that it constitutes a denial of due process of law and a denial of the equal protection of law, deprives petitioners of their property without due process of law, and constitutes the taking of private property for public use without compensation."

"2. The State has consented to suit against Respondents by its participation of the highway project in the Federal Highway Program, and the application by the Court to this case of Section 35, Article VI, of the Constitution of West Virginia is repugnant to the commerce clause of Section 8, Article I, of the Federal Constitution, in that it constitutes an interference with and burden upon interstate commerce."

Appellants continued to raise the Federal questions in the Assignment of Errors in each of their petitions for writ of error (Record, pp. 18, 19, 32, 33,) to the Supreme Court of West Virginia, the pertinent parts of which read almost verbatim the objections set forth in the final order as above.

The objections and assignment of errors were denied by The Circuit Court of Kanawha County and The Supreme Court of Appeals of West Virginia. respectively.

STATEMENT OF THE CASE

Appellants' petition in the trial Court alleges (Appendix J, p. 95a) the previous proceeding, the appeal thereof to this Court, the representations therein made by Appellees that mandamus was the proper remedy, and the action of this Court in dismissing the appeal in the light of such representations, all of which is more fully set forth in the opening paragraphs of this Judicial Statement.

The petition further alleges that Appellees have the constitutional duty not to deprive any person of property without due process of law or to take property for public use

without compensation, and in the premises of such constitutional duties, upon the appropriation of private property for public use, the further duty to institute eminent domain proceedings to legally acquire it and pay for it. (Appendix J, p. 98a).

The petition further alleges that Appellant Paul Price entered into a highway construction contract with the Road Commission for the construction of a Federal Aid secondary road project. The contract included highway construction for the State Road Commission itself on its right-of-way, and the construction of a slack water dam on an adjoining recreational area owned by the State Conservation Commission, which pursuant to statute (Appendix I) it undertook through the office and facilities of the Road Commission (Appendix J, p. 99a). The roadway work and the dam work each had separate specifications (Appendix J, p. 99a). There is set forth the various statutory authorities and duties of the Road Commissioner to enter into such contracts, audit the claims for work and issue requisitions for the payment thereof (Appendix J, p. 98a).

There is set forth pertinent contract provisions that the Appellant Paul Price was to be paid by monthly estimate the unit bid price for the actual quantities necessary to complete the work (Appendix J, p. 105a). The pertinent item of work involved in the action is Item 3 "Borrow Pit Excavation" under the dam portion of the work (Appendix 102a). The bid proposal, plans and special provisions ("Technical Specifications, Castleman Run Lake No. 1"), all being part of the contract documents, provided that the material required under "Borrow Pit Excavation" to be used in the dam construction *was to be taken and selected from the material removed in the roadway excavation, and the cost of selecting, segregating, hauling, placing and compacting said materials, according to the technical specifications of the Conservation Commission,* (in short, the building of the dam), *was required to be included in the unit bid*

price for Item 3, "Borrow Pit Excavation," and to be paid for under such item (Appendix J, p. 102a; *Appendix K*, p. 112a).

Appellant R. C. Wetherall had an employment contract with Appellant Paul Price to perform the actual work on the project for 90% of the unit bid price, less the costs thereof and he was to be paid for the same items and quantities of work for which Appellant Paul Price was to receive payment from the State Road Commission (Appendix J, 104a). *The work was performed and has been approved and accepted by the State Road Commission* (Appendix J, p. 105a). Appellants used 41,695.5 cubic yards of material in the dam, which was designated Item 3, "Borrow Pit Excavation." at a unit bid price of 50 cents a cubic yard. During the progress of the work the Road Commission paid Appellants monthly estimates for the estimated quantities of borrow excavation used in the dam (Appendix J, p. 105a). Upon the completion of the work the Road Commissioner calculated the final estimate of quantities and allowed for payment the 41,695.5 cubic yards of "Borrow Pit Excavation." (Appendix J, p. 105a). Subsequently, the Road Commissioner on his own accord arbitrarily eliminated from the final estimate, payment of the $20,847.75 for the 41,695.5 yards of "Borrow Pit Excavation" representing the payment for building the dam (Appendix J, p. 106a). He then deducted the amounts previously paid for "Borrow Pit Excavation" on the dam work, from the amounts still acknowledgedly due Appellants on items of road work. (Appendix J, p. 106a), and by so doing, *appropriated Appelants' materials, work, labor and services as incorporated in the dam, and which if not paid for as "Borrow Pit Excavation", Appellants will receive nothing for building the the dam.* The stated reason for the Road Commission's action was the *supposed ground that under the Standard Specifications borrow material cannot come from a right-of-way* (Appendix J, p. 107a; Appendix K, p. 113a, 114a), *notwithstanding the express directions and provisions of*

the bid instructions, bid proposal and special provisions to the contrary, all of which *governed and took precedence* over the *Standard Specifications* by an express provision of the *Standard Specifications* themselves (Appendix J, p. 103a; Appendix K, p. 114a.) (See all of Appendix K for pertinent contract provisions verbatim. *At the time this was done, the Road Commission had already requisitioned and had transferred to it by the Conservation Commission the sum of $52,200, which included the amount of $20,847.75 for building the dam under the item "Borrow Pit Excavation which was to be paid to Appellants.*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The decision of the trial Court refuses to follow the decision of this Court by permitting Appellees to repudiate the representations made to and relied upon by this Court on the previous appeal, 382 U.S. 45 (1965).

2. The appeal to this Court in the previous declaratory judgment proceeding was on the same Federal questions arising from the application of the immunity provision of the State Constitution. Appellees, through the State Attorney General, represented in their motion to dismiss that Appellants proper and still available remedy was mandamus to compel eminent domain proceedings. This Court dismissed such appeal in the light of such representation. By demurrer to this mandamus proceeding, Appellees repudiated their representations to this Court, and again asserted the State Constitutional immunity provision. The trial Court held that the Appellees' representations and this Court's dismissal expressly in the light thereof did not become the law of the case, and that Appellees were not estopped by the record to again assert immunity. This holding is contrary in principle to the decisions of this Court in *Cowley* v. *Northern P. R. Co.*, 159 U.S. 569; *Fisher* v. *Shropshire*, 147 U.S. 133; *Davis* v. *Wakelee*, 156 U.S. 680; *Fletcher*

v. Peck, 6 Cranch 87, 137; *The New Philadelphia (Camden & A. R. Transport Co. v. Brady)*, 1 Black 62.

3. The importance of these questions is of grave and immediate concern to al highway contractors doing business with the Road Commission. All highway construction in West Virginia is under the control of the Road Commission through the Road Commissioner, who undertakes it through contracts with private concerns. The Road Commissioner, by law, is vested with extensive powers. With the expanding program in this State, he is entrusted with the expenditure of large sums of money and the control and responsibility for many and large construction projects. In the fiscal year 1965-66, the Road Commissioner spent *36.28% of all funds spent by the State of West Virginia* (Official West Virginia Blue Book, 1966, p. 920) being the largest expenditure by the State for any one function. *If the Road Commissioner, under the facts of the case, can with the State's immunity shield his actions in dealing with these contracts and the handling of these large sums of money, the consequences are far-reaching.* The trial Court's decision would sanction actions under color of office, whether intentional or unintentional, detrimental not only to the contractors, but to the road building program of this State and its general political and governmental well-being. It allows the state's immunity to become an instrument of favoritism, a tool of oppression, and a cloak for incompetence.

4. These questions are equally important to the citizens of this State who by State Constitutional mandate creating the State Road Fund, have earmarked for the Road Commission all revenue from highway users for the construction and maintenance of highways. *Similarly, it is important to the Federal government, which in promoting its national highway system, furnishes participating funds for projects undertaken by the Road Commission, the contracts for which are handled by the Road Commissioner.* 90% of the

cost of the Interstate project here involved was paid for by the Federal government. The Road Commission is utilized by the Federal government as its agent in the exercise of its Constitutional functions in effecting its national highway policy. The construction of these contracts, their consequences, the rights and obligations of the parties, present a question of Federal law within the principle enunciated by this Court in *U. S.* v. *Allegheny County*, 322 U.S. 174.

If the Road Commission and the Road Commissioner are allowed to successfully resist judicial determinations of controversies that may arise with the contractors, so that the contractors are unable to secure an impartial adjudication of their rights under their contracts and the protection of their property, and as may be necessary, a compulsion of the Road Commissioner to perform his official duties, the inevitable consequence is that all contractors must price their services on all contracts in such manner as will protect them from loss on one contract through arbitrary and unlawful actions by highway officials under the color of their offices. In the last analysis, this poses a wasteful drain upon the funds provided for the purpose by both State and Federal governments. (The trial Court noted its personal opinion in the companion appeal of *Howard Price* v. *The State Road Commission* (Appendix E, p. 82a) that the "doctrine of *immunity . . . as stated in our Constitution is archaic* and completely out of step with the times, when we observe the government, state and federal, engaging in big business").

5. The actions of both the Road Commissioner as alleged and of the trial Court in its dismissal, are both State action within the meaning of the Fourteenth Amendment, *Shelley v. Kraemer, McGhee* v. *Sipes*, 334 U.S. 1. Appellants' work, material, and services already performed and incorporated into the public dam on the public recreational area adjoining the highway, and their rights under the contract are "property" within the protection of the due process and

equal protection of law provisions of the Fourteenth Amendment (*Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *West* v. *Chesapeake and Potomac Tel. Co.*, 295 U.S. 662; *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312; *U. S.* v. *GMC*, 323 U.S. 373; *U. S.* v. *Pewee Coal Co.*, 341 U. S. 114. The taking of property for public use is comprehended both in the meaning of the due process clause of the Fourteenth Amendment and of the Fifth Amendment as made applicable to the State by the privileges and immunities clause of the Fourteenth Amendment. *West* v. *C. & P. Tel. Co.*, 295 U.S. 662; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Martin* v. *Creasey*, 360 U.S. 219.

6. This is a suit against the State Road Commissioner for wrongfully exceeding his authority in appropriating Appellants' property under color of office, and for failing to perform his Constitutional duty to legally acquire it through eminent domain proceedings. In this respect, the holding of the lower Court in refusing mandamus is in conflict with the decisions of this Court in *Rolston* v. *Crittenden*, 120 U.S. 390; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82; *Board of Liquidation* v. *McComb*, 92 U.S. 531; and *Noble* v. *Union River Logging Company*, 147 U.S. 165; and contrary in principle to *Sterling* v. *Constantin*, 287 U.S. 378.

7. *Mahone* v. *State Road Commission*, 99 W.Va. 397, 129 S.E. 320, decided in 1925 by the State Supreme Court, held that the statute authorizing the Road Commission as a body corporate, to be sued, violated the State Constitutional prohibition that the State should never be made a party defendant. In *Stewart* v. *State Road Commission*, 117 W.Va. 352, 185 S.E. 567 (1936), and other cases, the State Supreme Court further held that this immunity was *absolute* and could never be waived by the Legislature, nor could the State or any of its instrumentalities ever consent to be sued. Despite these decisions, when the statute was amended in 1957, the Legislature nevertheless did not delete the consent

to be sued, *but on its reenactment reaffirmed its position that the Road Commission could sue and be sued.* These judicial holdings *impose a stringency in excess of the common law doctrine of immunity.* Under such holdings, it is impossible to give consent, although in fact *the Legislature has consented to suits against the Road Commission.* Such holdings, as against the assertion of a Federal right, constitutional or statutory, are in conflict with the decision of this court in *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184. It is likewise in conflict with *Lawrence* v. *State Tax Commission*, 286 U.S. 276, for the Federal Constitutional guarantee of due process likewise insures the privilege to have that right judicially declared and protected.

8. The trial Court in ruling on Appellees' *demurrer*, took the position that by virtue of the decisions of the State Supreme Court, this mandamus proceeding was subject to the same infirmity as the previous declaratory judgment proceeding and was an action against the State. The trial Court's ruling in this respect, without the taking of evidence on the merits so as to determine whether the proceeding was against the State or the Road Commissioner, is in conflict with this Court's decision in the cases of *Land* v. *Dollar*, 330 U.S. 731; *U. S.* v. *Lee*, 106 U.S. 196; and *Tindal* v. *Wesley*, 167 U.S. 204.

9. The money for the payment of the dam construction was *expressly appropriated* by the state Legislature *for such purpose.* It had been *separated and segregated* from the general revenues, and *actually transferred* by the State Conservation Commission to the State Road Commission *for payment to the Appellants* for the dam construction. Inherent in the trial Court's opinion was its opinion in the previous declaratory judgment proceeding, that the proceeding was against the State in view of the fact that to compel the Road Commissioner to perform his duty to institute eminent domain proceedings would set in motion a

sequence of events which would ultimately result in the payment of this money. This holding is contrary in principle to the decision of this Court in *Houstin* v. *Ormes*, 252 U.S. 469.

10. On demurrer, the allegations of Appellants' petition must be assumed to be true, *Ickes* v. *Fox*, 300 U.S. 82, 96. The facts alleged are that the Road Commissioner, by refusing to institute eminent domain proceedings, has appropriated $20,847.75 of Appellants' property as incorporated in the public dam in a public recreational area without compensation to Appellants, and for which the Road Commissioner has collected the payment therefor from the State Conservation Commission, and kept to the use of the Road Commission contrary to the purpose for which it was appropriated by the State Legislature. *Appellants have been deprived of their property for public use, denied their compensation therefor, and refused the opportunity to establish their rights. Appellants have not had their day in Court, they have not had the due process of law.*

CONCLUSION

The questions presented on this appeal are of public importance, affecting the State and Federal highway construction program and the highway construction industry. They comprehend the required extent of governmental morality, the accountability of State officials, and the necessary balance between the prerogative of governmental authority and the Constitutional rights of the individual. Appellants submit that the precedents established by this Court do not support the decision of the Circuit Court of Kanawha County, but require its reversal, and that the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument, for their resolution.

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